

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENDAN PICHA, MAX J. HASTINGS, KYLE
MCKUHEN, JAMES DEREK TAYLOR, and CHRISTINE
CALDERWOOD, Individually and
On Behalf of All Others Similarly Situated,

Plaintiff,

v.

GEMINI TRUST COMPANY, LLC, TYLER
WINKLEVOSS, and CAMERON WINKLEVOSS,
Defendants.

No. 1:22-cv-10922-NRB

Hon. Naomi Reice Buchwald

DECLARATION OF TRAVIS FREEMAN

Travis Freeman declares pursuant to 28 U.S.C. § 1746:

1. I am over 18 and competent to make this declaration. I have been employed by Gemini Trust Company, LLC (“Gemini”) for five years and am currently Gemini’s Director of Compliance. In that role, I am familiar with, and I have access to, Gemini’s records kept in the ordinary course of business regarding the process for creating and activating accounts and accepting the terms of the Gemini User Agreement.

2. The following facts are based on my personal knowledge and review of Gemini’s records created and maintained in the ordinary course of Gemini’s business.

3. Gemini runs an online digital asset platform that allows customers to buy, sell, transfer, and store various cryptocurrencies through Gemini’s website. In order to use the Gemini platform, customers must first create a Gemini account and agree to the terms of the Gemini User Agreement.

4. Beginning February 1, 2021, one of the services offered by Gemini was a lending program—Gemini Earn—in which registered Gemini users could elect to participate. Through the Gemini Earn program, participants such as Plaintiffs Brendan Picha, Max J. Hastings, Kyle

McKuhn, James Derek Taylor and Christine Calderwood (collectively, the “Plaintiffs”) were able to make the independent, purely voluntary decision to lend digital assets to Genesis Global Capital, LLC (“Genesis”) in exchange for payment of interest.

5. Participants in the Gemini Earn program or any other program offered via Gemini’s online platform were required to agree to the Gemini User Agreement (the “User Agreement”), which is the initial contract that governs the relationship between Gemini and users of the Gemini platform. It is impossible to become a Gemini registered user, including a participant of the Gemini Earn program, without first agreeing to the terms of the User Agreement.

6. Gemini maintains a log of certain actions taken by individuals in connection with their use of the Gemini platform. The logs for the Plaintiffs show that they completed the Gemini account registration process and thus accepted the User Agreement on the dates and times set forth below next to their name:

- a. Brendan Picha: December 5, 2017
- b. Max J. Hastings: September 8, 2017
- c. Kyle McKuhn: May 16, 2016
- d. James Derek Taylor: February 20, 2021
- e. Christine Calderwood: May 30, 2021

7. To open an account on any of the dates described in the preceding paragraph, an individual had to use Gemini’s online account registration page. On the registration webpage, an individual was prompted and required to enter his or her full name, email address, and a password. Before proceeding further in the account creation process, the individual was required to affirmatively check a separate box next to language stating “By creating this account, you

agree to our User Agreement and Privacy Policy.” The phrases “User Agreement” and “Privacy Policy” each hyperlinked to the full text of the respective document on Gemini’s website in place at that time so the individual could review it.

8. A screenshot of the relevant portion of the Gemini account registration webpage as it appeared in 2016 and 2017 is attached as **Exhibit 1**. A screenshot of the relevant portion of this webpage as it appeared in 2021 is attached as **Exhibit 2**.

9. When Plaintiffs registered with Gemini, it was impossible for an individual to create an account without checking the box expressly indicating agreement to the User Agreement. In 2021, continuing the signup process required an individual to click a button with the text “Next.” If an individual had not checked the box agreeing to the User Agreement, the “Next” button remained grayed out and inoperable. Ex. 1. In 2016 and 2017, the website account creation process required an individual to click a button with the text “Create My Account.” Ex. 2 at 1. If an individual tried to click the “Create My Account” button without first checking the box agreeing to the User Agreement, the registration process could not be completed. Ex. 2 at 2-4.

10. The User Agreement’s terms are updated from time to time, but the User Agreement has at all times included, and continues to include, an arbitration clause stating that “[the user] and Gemini agree and understand that any controversy, claim, or dispute arising out of or relating to this User Agreement or [the user’s] relationship with Gemini —past, present, or future— shall be settled solely and exclusively by binding arbitration.”

11. As relevant here, the User Agreement was updated on December 14, 2022, and that version of the User Agreement was operative on the date this lawsuit was filed. The amended User Agreement is attached as **Exhibit 3**.

12. On December 15, 2022 at 6:26 p.m., Gemini sent an email to all registered users explaining that the User Agreement changed and encouraging Gemini users to review the amended User Agreement. The underlined phrase “User Agreement” hyperlinked to the full text of the amended User Agreement on Gemini’s website so the individual could review it without logging into his/her account. The email is attached as Exhibit 4.

13. Further, if the user chose to log into his Gemini account after December 14, 2022, the “Sign In” page instructed as follows: “Our User Agreement has changed, including the Dispute Resolution provision. By clicking ‘Sign In’ below, I agree to Gemini’s USER AGREEMENT and PRIVACY POLICY.” A screenshot of the relevant portion of this webpage is attached as Exhibit 5. The underlined phrase “USER AGREEMENT” hyperlinked to the full text of the amended User Agreement attached as Exhibit 3.

14. The logs for Plaintiffs show that they each logged in to their Gemini account on the date set forth below next to their name and thus accepted the amended User Agreement on the noted date:

- a. Brendan Picha: December 25, 2022
- b. Max J. Hastings: December 23, 2022
- c. Kyle McKuhen: December 20, 2022
- d. James Taylor: December 16, 2022
- e. Christine Calderwood: December 16, 2022

I make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

By Travis Freeman
Travis Freeman